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ABSTRACT

This report reviews and analyzes six books on the subject of the law and racial equality, especially as related to school desegregation. The books examined are: (1)"Government by Judiciary" by Raoul Berger, which examines the Supreme Court's interpretation of the 14th Amendment; (2) "Disaster by Decree," by Lino A. Graglia, which criticizes Supreme Court rulings requiring integration as opposed to prohibiting segregation; (3) "American Constitutional Law," by Lawrence E. Tribe, which also discusses the Supreme Court's commitment to the 14th Amendment; (4) "Desegregation from Brown to Alexander," by Stephen L. Wasby, Anthony D'Amato, and Rosemary Metrailer, which is concerned with the effect of strategic considerations on Supreme Court actions; (5) "Limits of Justice: The Courts' Role in School Desegregation," by Howard I. Kalodner and James J. Fishman, a case study analysis of eight desegregation cases: and (6) "Must We Bus? Segregated Schools and National Policy," by Gary Orfield, which studies the role of the lower courts in desegregation law. The report concludes with an historical perspective of writings on desegregation law, judicial activism, and the evidence of racism in Supreme Court decisions. (APM)

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The Law and Desegregation

Meyer Weinberg

Undoing racial oppression which is embedded in the law is an enduring challenge to the American Constitution. How to do it or even whether it can be done at all are problems posed by various scholars who have written on the subject. Here we shall examine six books which grapple with these questions. Before doing so, however, let us review some background.

Oppression based on legal authority is the most devastating form of political despotism. It is all-embracing in scope and pitiless in its techniques. It thrives on appearances of normality and order. Dominant social groups, whether sponsors or simple beneficiaries of the legal oppression, help create a culture of despotism that perpetuates the postulates of the order. Both public and private sectors interact to diffuse the political system with governmental mechanisms that constitute the regime of oppression. The oppressed, because of the inequality of power in their social relationships, seek to endure under the blows of oppression and create, as far as practicable, an independent culture and society.

On a scale almost unique in world history, the American Civil War, waged by oppressed slaves and their more numerous white allies, created a new citizenry. Some four million slaves were transformed into legally-free persons. Many Americans, including not a few historians, have been so mired down in arguments over whether the ending of slavery was a conscious goal of the war that they have failed to note a grander result of the war: A new nation took shape and a new citizenry had to be defined. While some hastened to provide the new definitions, many others hesitated and tarried.

The former slaves were faced with a double task: They sought to maintain and expand the conditions of freedom while helping determine a new content to the legal foundations of that freedom. The first task faltered on two scores: (1) national political support for the freedmen fell away within a decade and (2) new systems of exploitation in southern agriculture recreated, in part, the subordination of

Note: The author wishes to thank David Schimmel for his close reading and helpful suggestions in revising this paper. (M.W.)

slavery and gross inequality in rewards. The second task was evaded by successive national governments as the 13th, 14th, and 15th Amendments were enforced selectively, restrictively, and haltingly.

Five decades after emancipation, black civic status had been defined by American law as separate and subordinate. In less than two decades (1883-1899), the U.S. Supreme Court rejected the constitutionality of a basic statute designed to protect the freedman's civic equality (*Civil Rights Cases*), proclaimed that segregation was constitutional (*Plessy* v. *Ferguson*), and held that a state might close down a black school and use tax funds to keep a white one open *(Cumming)*. A racist social order, built on the embers of the Civil War, once more became legal. The promise of emancipation ebbed over the years.

Meanwhile, courts and commentators accepted the new legal order, which meant they saw it as a new normality. A failure by states to protect the freedman's status as citizen was transmogrified into a rule that only the states might, if they wished, remedy the failure. Failure by the federal government to assure freedmen their positive rights became a rule that it was improper for federal authorities to intervene on behalf of freedmen and their descendants. In each case, the definition of legal propriety was drawn to the disadvantage of the freedmen. Since a similar systematic bias characterized every other civic and governmental institution, the legal default merged with all others and became unexceptional. In short, it was "normal" and thus "proper".

After World War II, blacks sharply heightened their traditional protests into a vigorous national movement against racial discrimination. The historic default on emancipation was indicted once more and calls issued forth on behalf of century-old commitments. Still central was the glaring failure to honor the full citizenship of black Americans. Now, however, altered political circumstances, based largely on growing black self-organization, opened the prospect of legal redefinition. Indeed, this task became ever more a governmental necessity and not merely a political move to quiet protestors. So deeply had the caissons of racism been sunk into the American Constitution, that only a basic reconstruction would suffice to achieve a truly new citizency.

It is in this context that contemporary constitutional disputes about racial equality must be evaluated. In the remainder of this issue of the *Research Review of Education* we examine six books which bear directly on racial equality, especially as related to school desegregation. While each of these will be discussed in its own terms, we will also view them from the perspective sketched in these introductory remarks. No attempt is made to treat either the works or the issues exhaustively.

Raoul Berger

In his *Government by Judiciary*, Raoul Berger is concerned with whether the Supreme Court has improperly stretched the 14th Amendment beyond the limits defined by the framers of that measure. He believes this has, in fact, happened, as is indicated by the subtitle to the book: "The Transformation of the Fourteenth Amendment". Berger contends that a careful reading of congressional debates on the Amendment reveals a clear line of reasoning that has been distorted by the Supreme Court, especially since 1954.

Berger acknowledges that "the central preoccupation of the framers [of the Amendment] was the oppression of Negroes under Black Codes and similar discriminatory *laws*."[1] The Amendment, in other words, was designed to eliminate state enactments that placed blacks at a civic disadvantage. (The Codes regulated wages, working conditions, the bearing of arms, mobility, and other subjects.) Thus, Berger explains: "The framers sought only to secure to blacks the same specified rights as were enjoyed by whites. . . ."[2] There is no basis in the Amendment, according to Berger, for arguing that states are obliged to provide rights to blacks which whites do not have. All the less does Congress have such a duty.

Berger wants to distinguish between matters intended by the framers (protection against discriminatory laws as the Black Codes) and those which were clearly not intended (states' rights to exclude blacks from voting, to bar non-segregated schools, or to forbid interracial marriages). He observes that the North as well as the South was unready during Reconstruction days to welcome black integration into white institutions. Accordingly, holds Berger, it is inaccurate to represent the framers as having intended to write the Amendment so as to require desegregation as a constitutional mandate.

What of the *Brown* decision? What does Berger regard as its constitutional status? Throughout the book he uses quotation marks around the word desegregation. The 1954 ruling he regards as a judicial revision of the 14th Amendment and therefore improper. Justice Warren, he writes, wrongly interpreted the Amendment "to mean exactly the opposite of what its framers designed it to mean, namely, to leave suffrage and segregation beyond federal control, to leave it with the States, where control over internal, domestic matters resided from the beginning"[3] In fact, declares Berger, "the desegregation decree is . . . a prime example of how the Justices imposed their will upon the people".[4]

1. Raoul Berger, *Government by Judiciary, The Transformation of the Fourteenth Amendment* (Cambridge, Mass.; Harvard University Press, 1977), p. 241.
2. *Ibid.*, p. 176.
3. *Ibid.*, p. 245.
4. *Ibid.*, p. 328.

If, then, *Brown* is to be regarded as constitutionally invalid, should an attempt be made to revoke the desegregation rulings? Berger states no, but only on practical grounds:[5]

> It would . . . be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions . . . have aroused in our black citizenry—expectations confirmed by every decent instinct. That is more than the courts should undertake and more, I believe, than the American people would desire.

While constitutional principle lodges Berger in opposition to *Brown*, political realism moves him over to a position of countenancing, if not supporting, the decision.

Desegregation is only one of several topics treated by Berger. In each case, however, the general procedure is similar. Court-ordered reapportionment, revision of the number of jurypersons, and desegregation are portrayed along the same lines. Each is an example of an "increasingly free and easy judicial revision of constitutional norms".[6] Unless this trend is halted, Berger warns, American democracy is gravely endangered. The makers of the Constitution never intended the judiciary to usurp the carefully delinited powers granted it in 1787. If it wishes to broaden those powers, it must first consult the American people.

Lino A. Graglia

Unlike Berger, Lino A. Graglia, in his *Disaster by Decree*, accepts the *Brown* decision while criticizing severely the Supreme Court's failure over a decade to require its enforcement. He reserves his strongest criticism, however, for the Court's decisions of 1968-1973 wherein, he charges, the Court abandoned *Brown's* goal of prohibiting racial segregation and began requiring integration. There was, he asserts, no constitutional basis for the shift and declares that the Court had thereby endorsed the principle of racial discrimination.

By segregation, Graglia means the "assignment of children to separate schools according to race . . ."[7] Desegregation he interprets as the legal obligation under the 14th Amendment to cease assignment by race. He opposes, however, what he calls "racial balance" defining it as "the use of racial discrimination to increase racial mixing that results from prohibition of racial discrimination."[8] "Racial discrimination" in this context means to Graglia any court-required use of racial criteria to achieve racial balance or integration. In other words, Graglia envisions a *Brown*-based desegregation principle as ensuring

5. *Ibid.*, pp. 412-413.
6. *Ibid.*, p. 397.
7. Lino A. Graglia, *Disaster by Decree. The Supreme Court Decisions on Race and the Schools* (Ithaca, N.Y.: Cornell University Press, 1976), p. 83.
8. *Ibid.*, p. 15.

that school districts would cease using formal racial criteria in assignment of pupils but which also precludes the courts from requiring affirmative action by the districts to create racially-mixed enrollments. An illegally all-white school which remained all-white even after the school board explicitly abandoned racial criteria for assignment, would, according to Graglia's definitions, be desegregated.

During 1954-1964, as Graglia and most commentators agree, the Supreme Court was only minimally concerned with the enforcement of *Brown*. Little desegregation occurred. With passage of the Civil Right Act in the latter year, enforcement sped up. " . . . By 1968," writes Graglia, "progress in eliminating school racial discrimination was very great and was rapidly increasing as a result of the . . . Act."[9] In the midst of such progress, however, the Supreme Court became a convert to affirmative action theories of desegregation and integration.

A series of decisions illustrated the new turn in Court thinking. In 1968, the Court ruled in *Green* that school board declarations abandoning racial criteria in assignment were no longer acceptable unless they resulted in actual desegregation or, in Graglia's terms, integration.[10] Lower-court judges could continue to accept desegregation plans that did not require the cross-assignment of children so long as such cross-patterns of attendance actually developed. *Green* also stressed the need for prompt action by school boards.

Graglia regards *Green* as having established a system of compulsory integration and governmental discrimination. A dual school system must achieve actual racial mixture or a court would direct it to do so. This power Graglia regards as improper. To an argument that this step is necessary in those instances where enunciation of a principle of desegregation has brought no real change, Graglia cautions: "Prohibition of an evil without correction of its continuing effects may in this imperfect world be all the progress and justice achievable at one time."[11]

Green worked a basic change in desegregation doctrine. Until then, courts approved "free-choice" plans whereby individual black children were given the right to opt out of an all-black school. If they failed to do so, it was not considered the fault of the school district. *Green*, however, shifted the responsibility for desegregation onto the school district. Thereafter, "free-choice" plans were acceptable only if they resulted in actual desegregation. While Graglia does not comment on this specific matter of shifting the burden, he calls the new requirement of school board affirmative action "racial discrimination" since it required race-conscious assignment.

Alexander, decided the next year, extended the reasoning of *Green* to a number of school districts in Mississippi.[12] The Court

9. *Ibid.*, p. 117.
10. *Green* v. *County School Board*, 391 U.S. 430 (1968).
11. Graglia, p. 77.
12. *Alexander* v. *Holmes County*, 396 U.S. 1218 (1969).

stipulated its ruling was to be implemented "at once". This was a far cry from *Brown II's* "all deliberate speed". Graglia regards the decision as "lawless tyranny" since it overruled a time-extension of five months granted by an appeals court. The Supreme Court's decision was handed down after three of the months had passed. What was the hurry?

In 1971, the Supreme Court ruled in *Swann*, a case regarding Charlotte, North Carolina. It has become known as "the busing decision".[13] Graglia does not equate "busing" with student transportation. Instead, he defines the term as "the compulsory transportation of school children out of their neighborhoods to increase school racial mixing or 'balance' . . ."[14] In the decision, the Court approved a lower-court order for mandatory pupil transportation if necessary to protect the constitutional rights of black children but cautioned against busing that interfered with the health or educational interests of children. It also stated that school attendance might be redrawn, even in "bizarre" shapes, so as to enable desegregation to become a fact. In addition, the Supreme Court permitted lower courts to accept desegregation plans containing precise numerical proportions of each racial group. It warned, however, that the proportions could only be used as a starting point rather than a fixed ratio.

Graglia attacks the decision on several grounds. For one thing, he charges, it ignored a provision of the Civil Rights Act of 1964 that asserted "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance." The Supreme Court contended the proviso applied only to *de facto* rather than *de jure* segregated districts. Graglia calls this argument "baseless".[15] Further, he denies that a competent court had found the school district was operating a dual school system prior to 1969. (There was no difference about the years before 1954.) One-race schools had been proscribed by *Swann* except if the school board could provide justification for an occasional one. Graglia contends that the Court failed to provide evidence that such a sweeping rule was justified.

In 1973, the Court decided *Keyes*, a Denver case. It held that once evidence established that a significant part of a school district was deliberately segregated—as in Denver—it could be presumed that the same held true for the remainder of the district. A court needed to examine that question but in the process it was the school district which bore the responsibility to disprove the presumption of district-wide discrimination.

13. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
14. Garglia, p. 13.
15. *Ibid.*, p. 121.

Graglia calls *Keyes*[16] "an opinion that strains logic and credulity to an extent rarely equaled even in 'desegregation' cases."[17] He finds it wanting principally because it left school boards with no firm basis for distinguishing constitutional from unconstitutional school practices.

All in all, Graglia concludes, "the most unfortunate result of the Court's integration requirement may . . . prove . . . to be simply that it has, in this multiracial and multiethnic society, reintroduced race as a permissible, and made it for the first time constitutionally required, basis of government action."[18]

Lawrence E. Tribe

Many of the central issues raised by Berger and Graglia are also discussed by Lawrence E. Tribe, but from a very different perspective. In his treatise, *American Constitutional Law*, Tribe deals with desegregation in a single chapter devoted to equal protection, but in various other parts of the book, as well as in a 1979 supplement, he asserts principles which are germane to the preceding sections of this paper.[19]

The core issue in Berger's book is whether or not the Supreme Court is bound by the intention of the framers of the 14th Amendment. Berger, as we have seen, answers in the affirmative. Graglia contends that it is judicial usurpation for the Supreme Court to mandate the use of racial criteria in desegregation plans. He calls the practice just another form of racial discrimination.

Tribe disagrees with both.

Along with Berger, Tribe asserts that the framers of the 14th Amendment meant to protect rights already in existence. Berger, however, is more certain than Tribe just what those rights were. On the other hand, Tribe does not argue that the right to attend a non-segregated school was among them. Rather, he rejects the idea that historical inquiry can dictate to later courts the proper limits of contemporary judicial action.

In one of his few direct references to Berger's book, Tribe writes:[20]

> Others have argued . . . that the judiciary should feel wholly bound by the examples of evils and indeed even by the mind-set that animated the Framers—concluding, for example, that the racial bigotry of many who wrote or ratified

16. *Keyes* v. *School District No. One*, 413 U.S. 189 (1973).
17. Graglia, p. 179.
18. *Ibid.*, p. 260.
19. Lawrence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press 1978) and *American Constitutional Law. 1979 Supplement* (Mineola, N.Y.: Foundation Press, 1979). The former will be cited by title and the latter as *1979 Supplement*.
20. Tribe, *1979 Supplement*, pp. 1-2.

> the Fourteenth Amendment compels modern courts to give that charter of equality a reading so narrow as to bring into question the legitimacy even of *Brown* . . .

Inevitably, acceptance of outdated racist conceptions would cripple any meaningful rational effort to abolish racism in the United States. There being no discernible way to separate the racism from the antiquity of the framers' declarations or even intentions, Tribe advocates turning away from both in favor of more enduring values.

American constitutional history has frequently witnessed a sudden broadening of constitutional viewpoints that seemed at the time unconnected with earlier precedents. Indeed, the occurrence of such events is the very "stuff" of constitutional history. In their absence, there is little essential movement and thus even less to record. In time, these once-novel departures are incorporated into everyday practice and are viewed as unexceptionable. Tribe cites *Brown* as one example.

As a matter of fact, he points to a contradiction in Berger that seems to undermine the latter's critique of *Brown*. It will be recalled that Berger considers *Brown* to follow from an illegitimate interpretation of the 14th Amendment. At the same time, as we saw above, he does not advocate the reversal of the ruling[21]. This view would appear to support Tribe's earlier contention about the long-term incorporation of once-novel decisions into the arena of practical affairs. On the other hand, Berger stresses that to fail to advocate reversal of this—to him—legally repugnant ruling "is not to condone the continued employment of the unlawful means."[22] (He does not explain how, other than by reversal *Brown* could cease to have any effect in the future.)

Graglia's contention that "compulsory integration" is equivalent to racial discrimination can be confronted by two of Tribe's discussions. One relates to the deliberate use of racial requirements and the other to a matter of discrimination against members of a racial majority.

For the law to require "color-blindness", that is, a studied inattention to race when considering remedies for racial discrimination would, according to Tribe, "make hopeless the struggle against racism and its invidious efforts."[23] Race, he observes, is not an incidental aspect but "a fundamental fact of our history and social organization, and [is] not one which realistically may be ignored."[24] In a discussion of the *Bakke* case, Tribe declares: " . . . To *consider* race is often to treat people as individuals more than is possible if one *ignores* race. Minorities and women, who suffer now from not having been treated as individuals in the past, would perceive more than a little irony in a

21. Berger, *Government by Judiciary*, pp. 412-413.
22. *Ibid.*, p. 413.
23. Tribe, *American Constitutional Law*, p. 1043.
24. *Ibid.*, p. 1044.

result that prevented reasonable remedies in the name of individual treatment."[25] He applies the same logic to desegregation.

It is noteworthy that whenever Tribe discusses a desegregation case that Berger or Graglia also discusses, he fails to agree with their analysis. This is true, for example, of *Green, Swann,* and *Keyes.* Unlike Graglia, who advocates a narrowing by the Supreme Court of the reach of desegregation remedies, Tribe criticizes precisely those high-court rulings in 1976 and 1977 that tended in such a direction. He highlights the Court's *Washington* v. *Davis* ruling of 1976 which required a demonstration that a legal action be traced to "a racially discriminatory purpose" before it could be held unconstitutional.[26] To Tribe, this standard is hardly defensible:[27]

> A test that invariably requires demonstration of motive to establish an equal protection violation poses an obstacle which often will prove insurmountable. If this standard were taken literally, relief would be forthcoming only in the most obvious instances of racial discrimination.

One may imagine that Graglia favored the *Washington* v. *Davis* doctrine for this very reason.

If the judicial color-blindness Graglia advocates is unacceptable to Tribe, so is the former's contention that mandatory desegregation discriminates against whites. "Until our society's widespread racial prejudice recedes," writes Tribe, "or until minority members acquire sufficient political leverage to ensure fully equal justice through the political process, judicially compelled integration may be the only acceptable response to the high probability of governmental prejudice and corruption behind all segregation."[28] Indeed, adds Tribe, legal positions such as Graglia's fail to understand that while "in the case of desegregation decrees, it could be argued that some white children are 'deprived' of race-neutral school assignments . . . yet deprivation in that limited context is fully justified as part of a judicial act remedying institutional discrimination."[29]

Both Graglia and Berger dwell on the proper interpretation of the 14th Amendment as a guarantor of equality. Tribe joins them in this endeavor. At the same time, however, he does not view that measure as the sole source of equal protection. The 13th Amendment, which abolished slavery, is capable of embracing numerous rights presently grounded on the 14th Amendment. "In a number of cases," writes Tribe, "the Supreme Court . . . invoked the 13th Amendment in declaring state legislation to be unconstitutional."[30] In 1968, the Supreme Court found that "Congress has the power under the 13th Amendment rationally to determine what are the badges and incident

25. Tribe, *1979 Supplement,* p. 95.
26. *Washington* v. *Davis,* 426 U.S. 299 at 240 (1976).
27. Tribe, *American Constitutional Law,* pp. 1031-1032.
28. *Ibid.,* p. 1042.
29. *Ibid.,* pp. 1048-1049.
30. *Ibid.,* footnote 11, p. 259.

of slavery, and the authority to translate that determination into effective legislation."[31] Conceivably, Tribe notes, under this ruling "Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the 13th Amendment."[32]

No higher court has yet followed the lead of U.S. District Judge Noel Fox who, in finding the Kalamazoo, Michigan school board guilty of deliberate segregation also stated that the discriminatory actions violated the 13th Amendment. In this view, school segregation was a "badge and incident" of slavery and thus unconstitutional." Tribe does not comment on this case but it supports the principle he seeks to establish.

Another avenue to equality that may make the 14th Amendment, in Tribe's word, "redundant" is the "privileges and immunities" clause in Article IV, section 2 of the original Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states". The term is repeated in section 1 of the 14th Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". The latter instance highlights rights that form part of national citizenship.[34]

Yet, Tribe can also conceive of Supreme Court interpretations of the 14th Amendment that might one day recognize "for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, work and schooling."[35] Neither Berger nor Graglia would seem to acknowledge the desirability of any such development.

Inseparable from the expounding of the Constitution that the Supreme Court does are the convictions held by individual justices as well as the Court as a whole. The same may be said of writers on constitutional law.

Throughout his book, Graglia, for example, sternly shoots down high court decisions that depart from established precedent. Berger portrays the written Constitution as an unwavering standard for later principled court decisions. Yet, it is not unknown for either writer to slip from the lofty standard.

In discussing the Supreme Court's unanimous decision in the 1971 *Swann* desegregation ruling, Graglia attacks it on several substantive

31. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).
32. Tribe, *American Constitutional Law*, p. 259.
33. The complete text of "Appendix E", in which Judge Fox explains his view of segregation as a vestige of slavery, is reprinted in *Integrateducation*, 11 (July-October 1973), pp. 82-84.
34. Compare Berger's treatment of the privileges and immunities issue in *Government by Judiciary*, chapters 2 and 3.
35. Tribe, *American Constitutional Law*, p. 574.

grounds. He also, however, is bitter about what he complains of as the court's insufficient responsiveness to the political process. Commenting on *Swann*, he observes:[36]

> The defeat of hope was made more complete by the fact that the opinion was written by Chief Justice Burger and made unanimous by the concurrence of the newly appointed Justice Harry Blackmun. If, as is often claimed, presidential elections and new court appointments can to some extent reconcile the court's power and democratic government, it would obviously take more elections than one and more appointments than two.

Ultimately, it took one more election and two additional appointments to tip the scale. By 1974, Tribe notes, one could speak of the Court's "mounting hesitation in the school desegregation area."[37] Four years later, he referred to the "instability" of Supreme Court doctrine on desegregation remedies.[38]

Stephen L. Wasby and Associates

One might conclude from the foregoing material that the Supreme Court is frequently internally split and therefore incapable of adopting a cohesive viewpoint. Both conditions may and do co-exist. A large number of biographical studies of high court justices have informed readers about tensions within the Court. Exceedingly few, however, have dwelt for long on the conscious managing of whole series of decisions by the Court as a whole. In a pioneer study by Wasby, D'Amato, and Metrailer, *Desegregation from Brown to Alexander*, a close analysis of race decisions from 1954 to 1969, the researchers are concerned with the effect of strategic considerations on high court action and inaction.[39]

Strategy implies a continuing awareness of goals and of means of achieving the goals as well as avoiding obstacles. It also requires a sense of what is politically possible, and, more important, impossible. Since jurists are not necessarily good strategists, their course of action is far from assured. Even when this strategy is successful, however, the analyst seeks to ascertain its impact on the substantive matter at hand. The analytical problem is not simply "what works" but "what works on behalf of what"? There is no armory of standardized strategic or tactical judicial weapons that one may employ on behalf of any subject at any time under any circumstances.

In the area of race relations, during 1954-1969, the Supreme

36. Graglia, *Disaster by Decree*, p. 104.
37. Tribe, *American Constitutional Law*, p. 1039.
38. *Ibid.*, p. 1042.
39. Stephen L. Wasby, Anthony A. D'Amato and Rosemary Metrailer, *Desegregation from Brown to Alexander. An Exploration of Supreme Court Strategies* (Carbondale: Southern Illinois University Press, 1977).

Court, according to Wasby and his colleagues, was strategically oriented. The justices "perceived a social result that was badly needed and adapted the wide variety of judicial means at their disposal to bring it about."[40] Richard Kluger, in *Simple Justice*, has shown in classic fashion how extensively various members of the *Brown* court politicked with one another to reach the final result.[41] In his autobiography, Chief Justice Warren relates how President Eisenhower improperly attempted to pressure him into discussing the case with the defendants' principal attorney, John W. Davis.[42] Justice Warren refused.

The *Brown* decision provided for a pause—of a year's length, as it turned out—before the Court issued an order to desegregate. In *Brown II*, instead of an "act-now" implementation order, the Supreme Court directed the federal district courts to move with "all deliberate speed." By postponing action for a year, according to Wasby and associates:[43]

> The Court . . . severely undercut the constitutional rights that it had just proclaimed . . . It was like saying, "Segregation is immoral, but you can continue doing it until we figure out a comfortable way for you to ease out of the practice."

As for the order in *Brown II*, write the researchers, "the vagueness of the initial guidelines [contained in the phrase 'all deliberate speed'] coupled with the absence of an ultimate maximum to be attained and the manner in which they were explained also led both leaders and ordinary citizens to believe that relatively little was required to achieve compliance."[44]

If the Court had expected anything more than token compliance, it was disappointed. A decade passed before Mississippi began any compliance at all. Meanwhile, observe Wasby and colleagues, "the justices beat an unseemly retreat from the public school education field which was to last, with a few exceptions, over a dozen years."[45] They characterize the progress of desegregation during these years as "spotty to negligible".[46] Supreme Court passivity signalled to the country that the "all deliberate speed" rule could be emasculated with impunity.

Attorneys representing black parents appealed repeatedly to the high court from absurdly tokenistic to outright antagonistic lower-court orders but all were turned aside. Wasby and associates comment:[47]

40. *Ibid.*, p. xv.
41. Richard Kluger, *Simple Justice* (N.Y.: Knopf, 1976).
42. Earl Warren, *Memoirs of Earl Warren, Chief Justice* (Garden City, N.Y.: Doubleday, 1977).
43. Wasby, D'Amato, and Metrailer, p. 107.
44. *Ibid.*, p. 125.
45. *Ibid.*, p. 107.
46. *Ibid.*, p. 166.
47. *Ibid.*, p. 167.

> . . . A community could comply with *Brown* by at most admitting a few Negroes to the previously segregated schools. Supreme Court denials of [reviews] . . . permitted the occasional action by some local [federal] courts demanding more of school boards but also left standing the predominant token action or non-action.

By the 1956 term, the Supreme Court was denying all appeals from the South: "Where such action let stand decisions adverse to *Brown's* intended beneficiaries, the Court passively presided over the dismantling of 'all deliberate speed' ".[48]

The Supreme Court strategy of quiet retreat was halted momentarily when in August 1958, the Little Rock, Arkansas case of *Cooper* v. *Aaron* was heard during a rarely-convened special session. A limited desegregation plan affecting only a single high school was being frustrated by the state's governor who had ordered the National Guard to exclude nine black students. After physical attacks on the children by white adults, the former were withdrawn for their own safety. President Eisenhower federalized the state's National Guard and sent federal troops to protect the integrity of the lower-court order. When a lower court directed postponement of the desegregation order, NAACP appealed to the high court, which after a delay while an appeals court considered the matter, finally dealt with the issue.

In *Cooper* v. *Aaron* the Court reaffirmed *Brown*, holding that school boards bore an affirmative responsibility for undoing illegal segregation.[49] It warned that opposition to desegregation, even to the point of violence, could not justify avoidance of this constitutional responsibility. A relapse in Supreme Court resolve, however, soon set in. Full-scale opinions on the subject remained scarce or non-existent, with preference continuing to be made in curt summary actions. Also, the Court did not change its preference to keep extended consideration of such cases in federal district courts.

The years from 1958—the *Cooper* year—to 1964 saw desegregation frustrated by widespread employment by southern school districts of pupil placement laws. These measures granted any student the formal right to transfer to another school if a specific procedure were followed. Black students whose parents were so bold as to attempt transfers rarely succeeded. Administrative step was piled upon administrative step until exhaustion of all but a few applicants was ensured. The U.S. Commission on Civil Rights denounced pupil placement laws as the principal impediment to desegregation in the South.[50] But the Supreme Court refused consistently during this period to hear challenges to the laws. Lower courts, following the lead of higher courts, proceeded to treat pupil-placement as a legitimate

48. *Ibid.*, p. 169.
49. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).
50. U.S. Commission on Civil Rights, *Civil Rights U.S.A.: Public Schools Southern States, 1962* (Washington, D.C. GPO, 1962), p. 4.

desegregative device. Even when, as in Alabama, "the law's author had stated that the law's purpose was to reinforce rather than eliminate segregation, the district court, following the normal practice of not looking at motivation, said it must presume that the law would be administered in a constitutional manner, but warned that if it was not the court would not hesitate to strike it down."[51] No such action occurred.

The strategy of doing little and saying less left the Supreme Court with next to nothing to account for. Refusing to review many lower-court decisions, and contenting itself with summary actions that needed to be signed and hardly more, the high court, declare Wasby and associates,[52]

> . . . certainly impeded the progress of desegregation by failing even to begin to develop doctrine with respect to implementation . . . The Court's actual course of action . . . resulted in increased use of tactics for delay followed by increased litigation as people sought to know what was on the court's mind.

Nevertheless, the strategy of selective inaction seemed practical to the Court, given the absence of any Congressional encouragement or positive interest by executive departments.

The Eisenhower administration was antagonistic toward *Brown* while the Kennedy administration generated "few major school desegregation initiatives."[53] During the first year of the Johnson administration, which saw passage of the epochal Civil Rights Act of 1964, the lack of Supreme Court doctrine retarded remedial action. "While enforcement could increase if and when the courts moved ahead," write the Wasby group, "the absence of Supreme Court rulings on major aspects of desegregation meant the executive branch had little to use in trying to hold school districts to higher standards than those of the local federal district judge".[54]

With passage of the Civil Rights Act and the presence of a surging civil rights movement, the political situation underwent considerable change. The Johnson administration responded by facilitating Office of Education guidelines for desegregation. For the first time, the executive and Congress adopted a positive stance toward desegregation. By 1968, the Supreme Court had begun responding. As we saw earlier, a series of significant decisions emerged—*Green, Alexander*, and others. Together, they ushered in a new day in desegregation doctrine. School districts were given the primary burden of dismantling segregation; individual students no longer needed to volunteer in order to effectuate desegregation. Desegregation must be established promptly; the formula "all

51. Wasby, D'Amato, and Metrailer, p. 194.
52. *Ibid.*, p. 198.
53. *Ibid.*, p. 211.
54. *Ibid.*, p. 212.

deliberate speed" was interred in the great American mausoleum of political slogans.

The strategy of curtness and silence from the bench passed. Once more the Supreme Court released complete opinions in which reasoned presentations were made. In a 1968 ruling, *U.S.* v. *Montgomery Board of Education*, the Court, in a highly unusual manner, praised the lower court judge—U.S. District Judge Frank M. Johnson, Jr.—by name. Wasby and associates point to the strategic meaning of this action: It was a way of endorsing full and prompt compliance with *Brown*, a position exemplified by Judge Johnson.

Reviewing the Court's action and inaction on race during 1954-1969, the Wasby group commented on the strategic devices that had been used during those years.

1. Selecting cases

Since many more appeals for review are rejected than accepted, the Court was able to frame, beforehand, the principal issues it would meet or evade in the decisions it later reached. Over time, as circumstances changed, selection of cases responded accordingly.

2. Deference and delay

Deference to lower-court judges in desegregation cases did not lead to compliance with *Brown*, especially in the Deep South. As late as 1968, U.S. District Judge J. Harold Cox openly regretted *Brown* in his Jackson, Mississippi courtroom. Delay by the Supreme Court may have expressed, in part at least, the absence of executive support until 1961.

3. Incrementalism

Acceptance of Supreme Court rulings is thought more likely the "smaller" the movement implied by the rulings. An impression grows that constitutional law expands step by step. There is great apprehension, among justices and public, over "jumps" in constitutional doctrine. During the entire period under review, Wasby and colleagues write, "the problem was more often that the Court did not move far enough forward not that it did not move forward . . ."[55] Yet, *Green* and *Alexander* could not be disguised as mere increments of preceding decisions. They were truly "jumps".

4. Summary dispositions

Instead of casting its decision in the form of a long opinion, the Court frequently prefers an anonymous statement representing the views of all members. They may extend for only several sentences or even one. Such rulings "had a way of serving to reinforce earlier doctrine by suggesting that the Court thought the matter clear and that the topic should be closed". At the same time, such opinions "attracted less attention than signed opinions, were less strong than full opinion rulings, and provided a basis for future action".[56]

55. *Ibid.*, p. 418.
56. *Ibid.*, p. 420.

5. Broader options

Strategic considerations influence the breadth of the opinion. "A broader opinion—at least one less tightly written—attracts more votes [on the Court]," write Wasby and associates.[57] Such an opinion will foreclose as few future matters as possible.

6. The Court's language

Close attention is paid by the Court to the precise vocabulary and style selected. As the researchers observe:[58]

> In choosing the rhetoric to use, the Court continuously had to be aware of its multiple audiences and their expectations that they hear law from the Court—that the Court not act "legislatively" or sound as if it were doing so . . . State officials were pacified through language about the state's police powers and state's rights. Certain words rather than others were used. Instead of "integration", one talked of disestablishing dual school systems. All such language indicates again the deference the Court showed to its audiences.

Obviously, opinions must be written. It is by selecting the precise manner of expression that the Court extends the domain of strategy.

The Wasby group's analysis adds to the realism of legal study without denying that the Court is simultaneously concerned with legal doctrine and principle. Judicial policy without strategy would stultify; judicial strategy without policy would be short-sighted.

Howard I. Kalodner and James J. Fishman

In *Limits of Justice: The Courts' Role in School Desegregation*, Kalodner and Fishman have edited a volume consisting essentially of case studies of eight desegregation cases. The places involved are Boston, Coney Island, Denver, Detroit, Indianapolis, Mt. Vernon, San Francisco, and Winston-Salem. The studies range from 50 to 90 pages and are written from the original trial record as well as from secondary materials to round out the picture. Clearly, it is fruitless to attempt a systematic summary and comparison of the studies in a few pages. Instead, we shall comment on five of the studies in terms of their relation to material discussed above.

Two of the case studies—Denver and Detroit—deal with litigation that brought forward significant U.S. Supreme Court decisions (*Keyes* and *Milliken*).

While Graglia spared no criticism in dealing with *Keyes*, Jessica and Jeffrey Pearson, authors of the Denver case study, do not criticize it in any respect. Instead, they present it as flowing logically from the

57. *Ibid.*, p. 421.
58. *Ibid.*, p. 423.

premises established by evidence of school board complicity in creating a racially-discriminatory school system. The Pearsons describe the board as "recalcitrant." A year after the Supreme Court ruling, the board is said to be using an appeal "as an excuse for lax or at best reluctant enforcement of the law."[59]

Milliken, wrote Graglia, "is unsatisfactory from almost any point of view".[60] He charged that no clearly unconstitutional act by the school board was established in court. Graglia welcomed, however, *Milliken's* 5-4 majority against the imposition of a metropolitan desegregation plan. Elwood Hain, author of the Detroit case study, disagrees in both respects. For one thing, he notes, the trial produced "overwhelming evidence of how housing and other aspects of life were deliberately segregated in Detroit . . ."[61] Judge Stephen J. Roth found deliberate segregation through school board utilization over the years of "attendance boundary changes, optional attendance zones, transportation from over-crowded schools, grade structures, feeder patterns, building site selection, and construction practices . . ."[62]

Where Graglia dealt only with the Supreme Court's ruling in *Milliken*, Hain devotes another 37 pages to events following the high court ruling. This valuable account portrays U.S. District Judge Robert DeMascio in an unfavorable light. Hain summarizes Judge DeMascio's desegregation plan as follows:[63]

> The plan . . . is openly solicitous of the fears of Detroit's remaining white population and tries to minimize occasions for white concern. It requires much less actual desegregation than even the defendants thought was legally required. It puts the burden of that desegregation mainly on the black children.

Hain notes further that "eighty percent of Detroit's black students are omitted from the plan."[64] Black school board president Cornelius L. Golightly stated that Judge DeMascio "has done all he can to protect the white community".[65] Reference here was to the court's preference for educational-improvement projects over racial desegregation measures.

The case studies of Denver and Detroit present a detailed view of how school segregation developed in these two cities. They are less than satisfactory, however, in that neither the Pearsons nor Hain explicitly confront some of the principled criticisms that have been made of both decisions. (Hain does refer to several comprehensive discussions of such subject-matter.)

59. Pearson and Pearson in Howard I. Kalodner and James J. Fishman (eds.), *Limits of Justice, The Courts Role in School Desegregation* (Cambridge, Mass.: Ballinger, 1978), p. 214.
60. Graglia, *Disaster by Decree*, p. 203.
61. Hain in Kalodner and Fishman (eds.), *Limits of Justice*, p. 245, footnote 105.
62. *Ibid.*, p. 249.
63. *Ibid.*, p. 279.
64. *Ibid.*, p. 284.
65. *Ibid.*, p. 289, footnote 366.

The case study on Boston, written by Ralph R. Smith, is the longest of the volume. (Neither Graglia nor Berger, on the other hand deals with Boston.) It is outstanding in its careful delineation of the historical background and community and school structure of the city. Having interviewed numerous persons who played a prominent role on one or another side of the conflict over desegregation in Boston, Smith ably sketches the political context of the conflict. The study itself will be of value to later historians seeking to understand the events.

In June 1974, U.S. District Judge W. Arthur Garrity found the school committee guilty of a long train of deliberately discriminatory actions that resulted in a dual school system. a group of white political leaders who had already been meeting for months to organize opposition to an earlier desegregation order by the state now started a campaign against the Garrity order. On the eve of the Fall semester, Smith reports, the Boston Police Patrolmen's Association indicated, in effect, that its members would feel free not to enforce certain of their superiors' orders. During the first year of desegregation, "disturbances were recorded on 130 of 174 school days".[66] In a greatly detailed analysis of specific acts of violence, Smith fails to reach a definite conclusion but leaves a strong impression of official misbehavior.

In Smith's narrative of daily events, Judge Garrity seems a different person than the one portrayed in the media. When faced with necessity to rule on a charge of criminal contempt on the part of school committee members, "Judge Garrity repeatedly searched for that middle ground which would provide a graceful way out for all concerned".[67] During the first year of desegregation, he appointed three Masters to draw up the second year's plan. When the plan was submitted to him, Judge Garrity made significant changes by increasing greatly the number of children bused. As Smith explains: "There is no question that, except for . . . the citywide school districts, the Masters' Plan did not promise to remedy significantly the racial imbalance in Boston's public schools."[68]

Throughout the events, the school committee led a procession of politicians in public defiance, and, when that failed, in deep-seated recalcitrance in the face of court orders. This stance was unparalleled in the North and to a great extent in the South as well. Indeed, it marks the uniqueness of Boston in the history of recent desegregation.

Smith is cautiously optimistic about the future:[69]

> The resources of the system are more equitably distributed. . . . The overall quality of education in Boston has been vastly improved as a direct consequence of the infusion of

66. Smith in *ibid.*, p. 67.
67. *Ibid.*, p. 78.
68. *Ibid.*, p. 91.
69. *Ibid.*, p. 110.

> attention, talent, resources, and energy due to the desegregation attempt.

He is somewhat doubtful, however, that years of judicial supervision have created a new "reservoir of good faith and good will" that will replace supervision once it is withdrawn. Since he wrote the chapter, events suggest that the prospect is brighter.

In 1971, U.S. District Judge Stanley A. Weigel found the San Francisco board of education guilty of deliberate racial segregation. David L. Kirp analyzes the case, and pays special attention to the failure of this purportedly pro-desegregation community to implement desegregation.

Central to the problematic of Kirp's case study is an assumption by the people of San Francisco that the city is "a politically progressive and tolerant community".[70] The author accepts at least some of this self-characterization which, in turn, forms the basis for many ironies propounded by him in the course of the study. There is reason, however, to question whether the city's liberalism ever attached to race. In 1963, sociologist Wilson Record declared racial liberalism in the Bay area a myth.[71] If he was correct, many of Kirp's ironies are only apparent. Thus, failure to desegregate San Francisco might be first cousin to a similar failure in Atlanta or Detroit rather than an inexplicable relapse of a generous liberalism. The systematic failure of desegregation efforts prior to filing of the court suit suggests as much.

In the first days after the 1971 decision, it seemed the school system was headed for full-scale desegregation. Yet, the eventual outcome was much more meager than that. In part, Kirp observes, this was traceable "to the incapacity or unwillingness of school administrators and the board of education to make it work."[72] Also, enthusiasm for desegregation among blacks and white liberals slumped after a time. Writing, apparently, around 1976 or so, Kirp observes that San Francisco's black community lacked interest in either desegregation or community control.

"If the desegregation plan which San Francisco produced appears far from ideal," writes Kirp, "it is no worse—indeed, it is far better—than those adopted by a great many other school districts."[73] This judgment is sharply contradicted by a recent internal evaluation of the city's busing plan done by Peter Esainko. In 1976 he declared:[74]

> There is a negative relationship between the amount of busing and the amount of integration within a zone. There's just no logic to that. The zone boundaries within the city

70. Kirp in *ibid.*, p. 413.
71. Wilson Record, *Minority Groups and Intergroup Relations in the San Francisco Bay Area* (Berkeley, Calif.: Institute of Governmental Studies, University of California, May 1963)
72. Kirp in Kalodner and Fishman (eds.), *Limits of Justice*, p. 484.
73. *Ibid.*, p. 491.
74. Quoted in *Integrateducation*, 14 (September-October 1976), p. 32.

were badly designed—some couldn't possibly be integrated—and they never have been revised. It was almost as if they were designed to fail.

Kirp holds out hope for litigation only when it is embedded in a receptive political framework. It cannot replace such a framework:[75]

> The point is not that social litigation is necessarily wasteful, or that its promise of reform is invariably deceptive. Yet such litigation can be, and often is, both wasteful and deceptive in its effects unless the "classes" that bring class-action suits can function as political constituencies, and unless the participants in such litigation worry at least as much about the consequences of victory as about how to engineer that victory in the rationalistic environment of a courtroom.

In 1978, the San Francisco lawsuit was dismissed by Judge Weigel. Within weeks, the NAACP had filed a new one. This action developed from a broadening protest movement among the city's blacks to reject an attempt by the school board—thus far, successful—to dilute the existing desegregation plan. With the dismissal of the lawsuit, the school board was left free to operate as it wished. Whether the protests will be sustained sufficiently to strengthen the black political constituency is a matter to be decided in the coming months. If they do, an effective political context will be restored to desegregation efforts by the black community.

The Indianapolis desegregation case is the oldest in the North, having begun in 1967 and remaining unsettled early in 1979. Over the dozen years, U.S. District Judge S. Hugh Dillin has presided in the case. In 1971 he found the school district had run a racially discriminatory system. (Segregation was legal in Indiana until 1949.) Two years later he ruled that an adequate desegregation plan for the city required involving suburbs in Marion County. This stance was approved by an appeals court although several years later, the case was returned by the U.S. Supreme Court for reconsideration. Meanwhile, an interim city-only plan has been in operation.

The school board, deeply antagonistic until recently to Judge Dillin, moved as slowly as was permissible. In 1973, for example, after Judge Dillin appointed two commissioners to aid him in drawing up interim and final desegregation plans, the school board refused to supply them with a telephone. According to William E. Marsh, author of the Indianapolis case study, the board cited as its reason that "the court had not explicitly ordered that they be given a telephone."[76] In another instance, the board's staff wrote a proposal for federal desegregation funds that was rejected "because it was, as some observers commented, so defective as to be bordering on contempt of

75. Kirp in Kalodner and Fishman (eds.), *Limits of Justice*, p. 492.
76. William E. Marsh in *ibid.*, p. 346.

court. Judge Dillin ordered . . . [the school district] to reapply . . . and the funds were ultimately received."[77]

In more recent years, a school board took office which pledged itself to pursue a metropolitan desegregation plan. It employed a civil rights attorney of national repute, Louis Lucas, and committed funds to carry through a full-scale legal effort on behalf of its views.

The Kalodner-Fishman volume also deals with Coney Island and Mt. Vernon, New York and Winston-Salem, North Carolina. Sufficient space is not available to review even the highlights of these sections of the book. The reader, however, will find them well-worth reviewing.

Kalodner has made some compelling observations based on the studies in the book. "With rare exceptions," he writes, "the school staffs, school boards, state commissioners of education, state legislators, governors, and federal agencies and officials have left to the courts the job not only of defining the scope of constitutional rights but of implementing those rights."[78] Writing in 1978, he concludes: [79]

> Flight from issues of school desegregation has characterized the federal government in recent years. Virtually the only question remaining in Washington is whether the Congress and President will attempt to limit more stringently the scope and duration of remedies to which resort has been made by the courts in their effort to procure for all public school students their constitutional rights. Virtually every case study contained herein shows a school board in similar flight . . . I . . . refer to the variety of delaying tactics school boards have resorted to after a judicial decision that their past conduct has violated constitutional rights . . . Many school boards pursue from the outset a course designed to shift the entire political burden of desegregation on the courts . . . It is certain that democracy cannot long survive governmental non-compliance with constitutional rights . . .

These thoughts are given added force by the extensive factual documentation in the eight case studies.

Gary Orfield

It is customary in works on constitutional law to deal principally with decisions by the Supreme Court; at times, appeals court rulings are discussed; almost never are federal district court actions discussed, except when they form part of an appeal to the Supreme Court. One

77. *Ibid.*, p. 345.
78. Kalodner in Kalodner and Fishman (eds.), p. 4.
79. *Ibid.*, p. 2-3.

result of this hierarchical arrangement is that the lower reaches of the federal judicial system are frequently disregarded by students of constitutional law. As a consequence, an impression may be gained that lower-court rulings are irrelevant to the main story. Viewed from another perspective, it is assumed that the lower courts are mere passive reactors to, or mechanical implementors of, the great decision-makers above. Presumably, then, a Supreme Court ruling of some consequence will be "applied" widely whenever the authority of appeals and district courts extend.

Although the U.S. Constitution is binding on all federal officials, as evidenced by their solemn oath of office, it is relatively seldom that much heed is paid the role of executive departments in desegregation law. Here, too, as in the case of the lower reaches of the federal court system, it is taken for granted that Supreme Court decisions will be "applied" within the realm of executive authority. In theory, the spirit as well as the literal meaning of high court decisions is expected to be reflected in executive action.

These as well as related issues are discussed in Gary Orfield's *Must We Bus? Segregated Schools and National Policy*. With reference to the first issue, Orfield shows how frequently Supreme Court decisions favorable to desegregation fail to seep down through the lower courts. Some desegregation cases currently in district courts are being conducted as though the Supreme Court had not decided *Keyes*. The burden of proof, which under *Keyes*, belongs on the shoulders of school districts, is still being carried by plaintiffs. Lower courts have accepted little more than token compliance. On the second issue, evidence establishes rather definitely that intentional nonenforcement by executive agencies can frustrate high court (and legislative) intent.

After the *Green* decision (1968) had been handed down, Department of Justice lawyers industriously entered one southern school district after another. Conformance with the new rule of desegregate-in-fact-promptly was sought throughout the region. In 1971, following *Swann*, Justice began acting in southern cities. Soon, however, the Nixon administration deliberately ordered a cessation of new desegregation suits. By 1973, despite the Supreme Court's decision in *Keyes*, the Denver case, writes Orfield, "The Justice Department . . . failed to take steps to see that the *Keyes* decision was carried out . . ."[80] Through the remainder of the Nixon and Ford administrations, Justice-initiated activity in desegregation fell below the level of action that existed prior to passage of the 1964 Civil Rights Act. Before that law, the Department was permitted by law to participate in desegregation litigation only by filing "friend-of-the court" briefs.[81] (The first years of the Carter administration did not see much change.)

80. Gary Orfield, *Must We Bus? Segregated Schools and National Policy* (Washington, D.C.: Brookways Institution, 1978), p. 343.
81. *Ibid.*, p. 319.

One departure in the Carter administration was a tendency by Justice to rely less on the Nixon-Ford policy "requiring proof of intentional discrimination at every school in a system before that system could be desegregated."[82] The Department, for example, tried in vain to convince the Supreme Court not to apply such a rule in the *Dayton* case. The court, however, ruled that where only a few constitutional violations were shown, a system-wide desegregation plan could not be ordered.

Under authority of the Civil Rights Act the Office for Civil Rights (OCR) of the U.S. Department of Health, Education, and Welfare (HEW) was formed to act as the latter's enforcement arm. The principal enforcement device was the Act's Title VI which forbade use of federal funds for racially discriminatory purposes. Federal aid can be withheld from violators. "Before 1970", Orfield writes, "HEW had begun about 600 fund-termination proceedings . . . [During 1970-1971] not a single case was initiated."[83] The Nixon administration was highly successful in deliberate non-enforcement of the Civil Rights Act. By 1971, according to Orfield, "the White House openly warned federal officials . . . they would be fired if they continued to urge busing."[84]

At a time when the Supreme Court was expanding the federal role in desegregation, HEW (and Justice) were retracting theirs': "In the space of a very few years, an OCR dedicated to the eradication of the doctrine of 'separate but equal' in education came to accept separate schools and the goal of making them more nearly equal."[85] Educational administrators learned that while the high court thundered mightily, the federal executive agencies could muffle even the loudest sounds. While *Swann* and *Keyes* were handed down, the Nixon administration worked effectively to frustrate these rulings. Congress, meanwhile, grew ever more antagonistic, even to the remnants of executive desegregation policy, and called for a reversal in direction. Mere inaction no longer suited it. The spreading white movement against desegregation which pronounced against busing rather than desegregation, was, in Orfield's words, not so much a conspiracy as a consensus.[86]

Conclusions

Historical perspective

On pages 3-4, above, we sketched an historical perspective on the relation of law to racial oppression. None of the six books reviewed presents the issues in this light. The nearest is Tribe but he bases his view on an interpretation of the fundamental aims of the Constitution

82. *Ibid.*, p. 341.
83. *Ibid.*, p. 293.
84. *Ibid.*, p. 291.
85. *Ibid.*, p. 309.
86. *Ibid.*, p. 107.

rather than on the problem of recasting the American nation after 1865. Berger calls upon the same order of evidence as Tribe but arrives at very different conclusions. Neither Graglia nor Orfield deals with the problem, preferring instead to place the events in a rather short-term range of contemporary considerations. The same can be said of Wasby and associates as well as of most contributors to the Kalodner-Fishman volume.

Clearly, historical perspective is not a strong point of contemporary writing on desegregation law. One might extend the remark to writing on civil rights law in general. But even historians may lack historical perspective just as logicians are not necessarily more logical than the rest of us, nor philosophers any wiser. The legal rights of American blacks derive neither from John Locke nor Thomas Jefferson for both were devotees of a governmental system in which slavery or virtual slavery was legitimate. It was only because of the rejection of such a system during the Civil War, whatever the short-range strategies involved, that the modern constitutional problem of black America arose. To repeat, the possibility of incorporating blacks as equal citizens into a new American nation first faced the country in 1865. Desegregation law can best be understood as a continuing effort in one sector of American public life to build that new nation.

This significance is missed if we continue to regard desegregation as either a "liberal" option to pursue or a "conservative" one to avoid. Neither characterization gets down to the fundamental problem concerned. Desegregation is an historic imperative. Someday, our legal writers may so acknowledge it. Dismantling the historic American system of white democracy is still a task facing the nation.[87] In the realm of the law the task has barely begun.

Peculiarity of civil rights

Civil rights, including desegregation, are treated most peculiarly in the federal courts. During closing oral arguments on the implementation of *Brown I*, the plaintiffs' principal attorney, Thurgood Marshall, said as much. Sensing a strong tendency of the Supreme Court to reject his argument that a definite timetable of desegregation was required, he told the justices: "But I don't believe any argument has ever been made to this Court to postpone the enforcement of a constitutional right. The argument is never made until Negroes are involved."[88] Nevertheless, the Court then made its "all deliberate speed" ruling. As Marshall had warned, events soon showed the vacuity of the slogan and thus the hollowness of the plaintiffs' purported constitutional rights.

In no other field of constitutional law is it contended by the high court that the enjoyment of constitutional rights may properly be

87. See George M. Fredrickson, *The Black Image in the White Mind. The Debate on Afro-American Character and Destiny, 1817-1914* (N.Y.: Harper and Row, 1971).
88. Thurgood Marshall in Friedman (ed.), *Argument*, p. 525.

postponed. An ordinance illegally restraining free speech is struck down without reservation. An impending corporate merger is approved and may proceed without delay. But black civil rights, as in *Brown I and II*, can be postponed.

Back in 1944, dissenting in the high court's *Korematsu* decision regarding the incarceration of Japanese-Americans, then-Justice Murphy characterized the majority ruling as "a legalization of racism".[89] This may have been the first judicial charge of "racism" made in a Supreme Court decision. Thirty-four years later, in the *Baake* ruling, Justice Blackmun referred, in a concurring opinion, to the need for overcoming "racism" in American society. The unique practice in constitutional law of failing to honor immediately personal rights of racial minorities acknowledged as constitutionally valid is itself an evidence of racism. One may hope that in time this practice will join other, discarded peculiar institutions.

Judicial activism

A strong trend in current legal thinking views "judicial activism" as a serious problem.[90] Usually cited as examples are judges known to have handed down far-reaching rulings favorable to desegregation of schools and other public facilities. U.S. District Judges Frank M. Johnson, Jr. and W. Arthur Garrity figure prominently in such discussions. Central to the examples is a contention that the judges involved are exceeding the proper limits of judicial authority. Further, such action is said to debilitate the governmental bodies regularly charged with responsibilities for schools or persons or what have you. The usual conclusions is that the courts should retreat into a narrower circle of activity.

Does this view hold water? Certainly, the two judges named above have few peers on the federal bench when it comes to determined supervision of governmental units held to have defaulted on their constitutional obligations. But the critics cloud their critique by confusing two separate factors: (1) the energy and scope of the judicial activity and (2) the beneficiaries. It is almost always assumed that "activist" judges are necessarily only those judges whose rulings benefit minorities, the poor, and the powerless.

The facts are quite otherwise but contrary examples cannot be found in the writings of the critics. This arouses a suspicion that their real target is the substance rather than the manner of the "activist" rulings. For every Frank Johnson there is a Robert DeMascio; and for every W. Arthur Garrity there is a William M. Taylor, Jr. Since, however, the names of DeMascio and Taylor are identified with restriction of desegregation, the critics do not regard their actions as

89. *Korematsu* v. *United States*, 323 U.S. 235 (1945).

90. See, for example, Nathan Glazer "Is Busing Necessary?" *Commentary*, 53 (March 1972), p. 47 and Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C. Brookings, 1977).

"activist". Once more, the actual standard of criticism is substance, not manner.

In a rare interview with Judge Taylor, *Los Angeles Times* education writer William Trombley explored chamber politics in the Dallas desegregation case. (It was Judge Taylor who had, in 1971, ordered the use of closed-circuit television as desegregation device. An appeals court struck it down four years later.) Very close consultation occurred between the court and a middle-and upper class coalition of businessmen and politicians, the Dallas Alliance. Referring to his personal friend Jack Lowe, an Alliance leader, Judge Taylor told Trombley: "Jack would call me and say 'Mac, we're making progress but slowly. You'll have to give us more time'. I told him the record was open until I said it was closed. There never was any discussion of any specifics, though every once in a while, on the grapevine, I'd get rumors of what they were working on."[91]

The Alliance desegregation plan turned out to be a minimal one. A section of the city—East Oak Cliff—which enrolled 28,000 minority pupils in 24 schools was omitted from the plan. In return, minorities were promised more money would be spent in the area and that some minority persons would be employed in high-level administrative jobs. In 1976, Judge Taylor adopted the plan and ordered it implemented. When the city's two newspapers failed to work up much enthusiasm for the plan, Judge Taylor met with editors "and they moderated somewhat in their views".[92]

Plaintiffs, represented by the NAACP, rejected the plan as unconstitutional. Their chief lawyer declared the plan left "28,000 children locked in a system where they will never get the advantages of an integrated education".[93] Two years later, in 1978, the U.S. Court of Appeals for the Fifth Circuit reversed Judge Taylor and returned the case to him.

In Detroit, Judge DeMascio also played a highly activist role in minimizing desegregation. As a veteran *Detroit Free Press* writer, William Grant, put it: "DeMascio made it clear he would have preferred to order no desegregation at all, but he was bound by the Supreme Court directive to do something".[94] When, in 1975, he was about to release his order, he conferred with school board representatives but did not inform plaintiffs of the meeting.[95] Earlier he had met privately with business and civic leaders. For a period of five months following issuance of his order, Judge DeMascio met numerous times with school board representatives to discuss forthcoming orders. At these meetings, writes Hain, "the plaintiffs were consciously excluded".[96]

91. William Trombley, "Dallas", *Integrateducation*, 15 (November-December 1977), p. 21. (This article was published originally in the *Los Angeles times*.)
92. *Ibid.*, p. 22.
93. *Ibid.*, p. 23.
94. William R. Grant, "Detroit", *Integrateducation*, 15 (November-December 1977), p. 2.
95. Hain in Kalodner and Fishman (eds.), *Limits of Justice*, p. 277.
96. *Ibid.*, p. 278.

Numerous examples of negative activism on desegregation could be drawn from other cities. The purpose here is neither to excuse nor indict various judges. Rather, it is to point out the largely ideological content of the issue of judicial activism. To do this fairly and thoroughly requires far more space than is available. Based, however, on sustained attention to this issue over the past two decades or so, one might guess that negative activism has been far more prevelant than the reverse that is so frequently decried.

Sources Used

Berger, Raoul, *Government by Judiciary. The Transformation of the Fourteenth Amendment.* Cambridge, Mass.: Harvard University Press, 1977

Frederickson, George M., *The Black Image in the White Mind. The Debate on Afro-American Character and Destiny, 1817-1914.* New York: Harper and Row, 1971

Friedman, Leon (ed.), *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka: 1952-1955.* New York: Chelsea House, 1969

Glazer, Nathan, "Is Busing Necessary?" *Commentary*, 53 (March 1972)

Graglia, Lino A., *Disaster by Decree. The Supreme Court Decisions on Race and the Schools.* Ithaca, New York: Cornell University Press, 1976

Grant, William R., "Detroit", *Integrateducation*, 15 (November-December 1977)

Horowitz, Donald L., *The Courts and Social Policy.* Washington, D.C.: Brookings Institution, 1977

Kalodner, Howard I. and James J. Fishman (eds.), *Limits of Justice. The Courts' Role in School Desegregation.* Cambridge, Mass.: Ballinger, 1978

Kluger, Richard, *Simple Justice.* New York: Knopf, 1976

Orfield, Gary, *Must We Bus? Segregated Schools and National Policy.* Washington, D.C.: Brookings Institution, 1978

Record, Wilson, *Minority Groups and Intergroup Relations in the San Francisco Bay Area.* Berkeley, Calif.: Institute of Governmental Studies, University of California, May 1963

Tribe, Lawrence H., *American Constitutional Law.* Mineola, N.Y.: Foundation Press, 1978

———, *American Constitutional Law. 1979 Supplement.* Mineola, N.Y.: Foundation Press, 1979

Trombley, William, "Dallas", *Integrateducation*, 15 (November-December 1977)

U.S. Commission on Civil Rights, *Civil Rights U.S.A.: Public Schools*, Southern States, 1962. Washington, D.C.: G.P.O., 1962

Warren, Earl, *Memoirs of Earl Warren, Chief Justice.* Garden City, N.Y.: Doubleday, 1977

Wasby, Stephen L., Anthony A. D'Amato, and Rosemary Metrailer, *Desegregation from Brown to Alexander. An Exploration of Supreme Court Strategies.* Carbondale: Southern Illinois University Press, 1977